NO. 87-519

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GARY D. MAYNARD, Petitioner

v.

WILLIAM THOMAS CARTWRIGHT,
Respondent

ROGER DALE HAYES, Amicus Curiae

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF OKLAHOMA

MOTION FOR PERMISSION TO FILE
BRIEF AMICUS CURIAE

AND

BRIEF AMICUS CURIAE ON BEHALF OF
ROGER DALE HAYES
IN SUPPORT OF RESPONDENT
WILLIAM THOMAS CARTWRIGHT

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March [illegible], [illegible]

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March 11, 1988

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SUPREME COURT OF THE UNITED STATES

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MOTION FOR PERMISSION TO FILE BRIEF
AMICUS CURIAE SUPPORTING RESPONDENT

Roger Dale Hayes respectfully requests permission to file the attached brief amicus curiae in the above-captioned case. He has received written permission of petitioner, representing the state of Oklahoma, to file this brief, a copy of which is being lodged with the Clerk of this Court. Respondent has refused permission.

INTEREST OF AMICUS

Roger Dale Hayes, amicus curiae, stands condemned to death for first degree murder in the state of Oklahoma. His

Petition for a Writ of Certiorari to this Court is currently pending in Hayes v. Oklahoma, No. 87-5676. Mr. Hayes' case raises essentially the same question as this case, the constitutionality of Oklahoma's application of the so-called "heinous, atrocious, or cruel" aggravating circumstance in the definition of those murders to be punished by death.

Mr. Hayes wishes to present arguments supporting respondent Cartwright's position in this case which are subsumed in the question presented by both petitioner and respondent. The focus of his argument will be upon whether it comports with due process to execute persons who had no notice of what would be considered "heinous, atrocious, or cruel" under state law at the time they allegedly committed their crimes. Given the briefing history of this case in the court below, under-

signed counsel believes that the focus of this argument will be somewhat different than that the parties have presented, in that the parties have not focused upon what knowledge was available to the general citizenry at the time of the crimes alleged.

This matter presents an alternate ground for affirmance of the judgment of the Tenth Circuit, and need not be considered if the Court finds Respondent's arguments persuasive.

The situation of amicus is probably typical of many death row inmates in many states, who are alleged to have committed their crimes between the time that the Legislature enacted the "heinous, atrocious, or cruel" aggravating circumstance and the time that the statute was given any definite, constitutionally limited interpretation by the Courts, pursuant to

cases such as Godfrey v. Georgia, 446 U.S. 420 (1980).

CONCLUSION

As someone whose life is at stake upon the issue raised in this case, it is just and equitable that the views of Roger Dale Hayes be heard thereon.

Respectfully submitted,

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No. 87-519

SUPREME COURT OF THE UNITED STATES

GARY D. MAYNARD, Petitioner

V.

WILLIAM T. CARTWRIGHT, Respondent

BRIEF AMICUS CURIAE OF ROGER DALE HAYES

IN SUPPORT OF RESPONDENT

SUMMARY OF ARGUMENT

The matter presented in this brief is solely an alternate ground for affirmance of the judgment of the Tenth Circuit, and need not be reached if the reasons for affirmance advanced by Respondent are accepted.

The execution of respondent William T. Cartwright, and by extension of amicus curiae Roger Dale Hayes, would violate the Due Process Clause of the Fourteenth Amendment, specifically the ex post facto-

type principles embodied therein. See Marks v. United States, 430 U.S. 188 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964). Failure of the Court of Criminal Appeals to provide a constitutionally limited definition of the statutory "heinous, atrocious, or cruel" aggravating circumstance at the time these crimes occurred deprived respondent and amicus of fair warning of what acts might be punishable by death thereunder.

ARGUMENT

A. INTRODUCTION

The reason for affirmance of the judgment of the Tenth Circuit presented herein is an alternate ground to those presented by Respondent William Thomas Cartwright. It need not be considered or address if the reasons presented by Respondent, which amicus Roger Dale Hayes joins, are accepted. It is presented because the Court below may be affirmed for any reason fairly comprehended within the question presented by the case.

Amicus Roger Dale Hayes agrees with the position of Respondent, William Thomas Cartwright, in his Brief in Opposition to Certiorari, at 4, and which he expects Respondent to continue to maintain, that the Tenth Circuit in this case "faithfully follow[ed] the fundamental constitutional principles established by this Court in

Godfrey v. Georgia, 446 U.S. 420 (1980). . .." This being the case, it is straightforward for this Court to affirm the judgment of the Tenth Circuit under existing caselaw.

Indeed, the brief of Petitioners, representing the state of Oklahoma, appears to admit that the Oklahoma courts have not been complying with Godfrey. Their brief consists principally of an attack on the vitality of the Godfrey holding that states must provide "a principled way to distinguish [those cases] in which the death penalty was imposed, from the many cases in which it was not." Id. at 433. See Brief of Petitioners at 55 (argument I-A), 56-78 (argument I-B). Amicus would join in what he expects will be Respondent's arguments demonstrating the continuing vitality of Godfrey. This is even a narrower basis

for the decision of this Court.

B. A CAPITAL DEFENDANT IS DENIED DUE PROCESS UNDER EX POST FACTO-TYPE PRINCIPLES WHERE THE STATE LAW STANDARD DEFINING WHAT ACTS WILL BE PUNISHABLE BY DEATH IS NOT SET FORTH UNTIL AFTER DEFENDANT'S ALLEGED CRIME IS COMPLETE.

On December 14, 1980, amicus curiae Roger Dale Hayes allegedly committed a murder. The Oklahoma Courts have condemned him to death on the ground that the crime was "especially heinous, atrocious, or cruel" under 21 Okla. Stat. sec. 701.12 (4). On May 14, 1982, respondent William T. Cartwright allegedly committed the crime for which he is condemned under the same statutory provision. At the time of these alleged crimes, there was no constitutionally limited definition of "heinous, atrocious or cruel" in effect in Oklahoma which could have been applicable to these cases. See Godfrey v. Georgia,

446 U.S.420 (1980) (plurality and concurring opinions) ("heinous, atrocious, or cruel" without limiting construction is too vague a standard on which to base a sentence of death); Eddings v. Oklahoma, 455 U.S. 104, 109 n.4 (1982) (Oklahoma law applied "heinous, atrocious, or cruel" to killing of police officer).

Because there was no such applicable limiting definition, amicus and respondent could have had no fair notice concerning what would be punishable by death under this provision. Without fair notice, execution of amicus or respondent would violate fundamental principles of due process analogous to the principles enunciated in the Ex Post Facto Clause.[1]

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[1] This argument is fairly subsumed within the due process issues raised by petitioner and respondent. If the Court believes it is outside that issue, then the Court should grant certiorari in Hayes v. Oklahoma, No. 87-5676, to address the

U.S. Const., art I, sec. 10; id., amend. XIV, sec. 1.

Fair notice of what acts will be subject to punishment, and in what amount, is "fundamental to our concept of constitutional liberty." Marks v. United States, 430 U.S. 188, 191 (1977); see Miller v. Florida, 107 S.Ct. 2446 (1987) (changes in sentencing guidelines covered by Ex Post Facto Clause even if definition of and maximum penalty for crime unchanged); compare Dobbert v. Florida, 432 U.S. 282, 297-98 (1977) (statute later declared unconstitutional because of its procedural provisions may provide fair notice of what conduct will be sanctioned by death). As this Court said in Godfrey, 446 U.S. at 428:

> Part of a State's responsibility . . . is to define the crimes for which

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argument.

> death may be the sentence in a way that obviates "standardless [sentencing] discretion."

Judicial constructions which unforseeably modify or expand criminal liability may not be applied to conduct occuring before they were announced, the same way that statutes creating crimes or increasing punishments may not be retroactively applied. Marks v. United States, supra at 191-92; Bouie v. City of Columbia, 378 U.S. 347 (1964); see Rabe v. Washington, 405 U.S. 313 (1972). Because "fair warning of that conduct which will give rise to criminal penalties . . . is fundamental," 430 U.S. at 191, cases such as Marks and Bouie have imported ex post facto principles into the Due Process Clause, despite earlier cases which held that the literal text of the Ex Post Facto Clause applies only to legislative enactments. E.g., Frank v. Magnum, 237

U.S. 309, 344 (1915).

What has happened both to amicus Hayes and respondent Cartwright is the sort of action condemned in Marks, Bouie, Rabe, and the host of Ex Post Facto Clause cases. Hayes and Cartwright have been condemned to death on the basis of a definition of capital offenses which could not have been clear to the citizenry at the time of their alleged crimes. Indeed, in the case of amicus Hayes, the State admits the Oklahoma rule was "determined" under state law years after Hayes' (and Cartwright's) alleged crimes.[2]

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[2] In its Response to Petition for writ of Certiorari, at 6, in Roger Dale Hayes v. Oklahoma, No. 87-5676 (dated November 12, 1987, the state of Oklahoma points out:

> [A]fter the decision in [State v. Roger Dale Hayes, 1987] was issued by the Court of Criminal Appeals that Court in Stouffer v. State, 738 P.2d 1349 (Okl.Cr. 1987) on rehearing, 58 Okla. Bar. J. 2352 [742 P.2d 652]

Where a statute is unclear, it does not provide fair warning concerning what acts it penalizes, or with what penalties. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Bouie v. City of Columbia, 378 U.S. 347, 351 (1964), quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

Lanzetta was a case remarkably like those of respondent and amicus. Lanzetta

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> (Oklahoma Crim. App. July 31, 1987)[,] determined that the aggravating circumstance of heinous, atrocious or cruel would be limited to those situations where the evidence showed there was torture or serious physical abuse of the victim.

Whether or not Stouffer "determin[es]" a state law definition of "heinous, atrocious, or cruel" which is constitutional is unimportant. What is significant is the implicit admission that one needs to apply a 1987 determination to crimes which happened between five and seven years before it was made. What could be more ex post facto?

was convicted of being a "gangster." The state statute defining "gang" and "gangster" was, on its face, impermissably vague. See 306 U.S. at 453-55, 458. The more definite state law construction of "gangster" under which New Jersey sought to uphold Lanzetta's convi·tion was not made until after Lanzetta's alleged crime and his trial. 306 U.S. at 456. This Court prohibited the use of the later construction:

> It would be hard to hold that, in advance of judicial utterance upon the subject, they [the defendants] were bound to understand the challenged provision according to the language later used by the court.

306 U.S. at 456.

That is exactly the case here. Neither amicus Hayes (in 1980) nor respondent Cartwright (in 1982) could be bound to understand the definition of "heinous, atrocious or cruel" to be

anything more definite or clear than the law as expounded to those points. They may not be required, at peril of their very lives, to "speculate" as to the meaning of this penal statute. By contrast, in Dobbert v. Florida, supra, this Court considered no claim that a new death penalty statute changed the law concerning which murders are substantively worthy of the death penalty. Thus there was no claim that the application of the new death penalty law had forced petitioner to speculate as to whether his crime would be considered worthy of death.[3]

Miller v. Florida, supra, is another

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[3] Dobbert held the application of new procedures in state statutes did not violate the Ex Post Facto clause. None of the changes addressed by the Court, however, involved a claim that the substantive definition of the crimes to which the death penalty would apply had changed.

analogous case. The Court there held that increases in presumptive sentencing guidelines could not be applied to a sexual battery committed prior to the changes, even though the maximum sentence for the crime had not changed. The Court held unanimously that the only notice of potential penalties for sexual battery that a citizen has are the statements of the maximum penalty and sentencing guidelines in force at the time the crime is committed. The Court held that a statutory provision allowing a Commission to change sentencing guidelines could not provide a citizen notice that changes would actually be made or what those changes would be, and thus could not be a basis for applying the new guidelines.

The situations of Hayes and Cartwright are similar to Miller's. By being subject to an unpredictable ex post facto "clari-

fication" of the "heinous, atrocious or cruel" aggravating circumstance, their alleged acts are subject to being brought into the class of acts subject to death, without any warning whatsoever to them. Not knowing what specific, narrowed definition of "heinous, atrocious, or cruel," marking the boundary between life and death, will apply to each of them is similar to not knowing what set of sentencing guidelines would apply to Miller. Each party is required, as Lanzetta says, to "speculate" concerning the criminal consequences of his actions.

Examination of state law at the time of the two crimes alleged in respondent's and amicus' cases reveals that there was no clear definition from which a person of ordinary intelligence could determine what murders would be considered especially heinous, atrocious or cruel. Indeed,

petitioners' entire principal brief is nearly an admission that Oklahoma has not been applying a definition that comports with Godfrey.[4]

The first Oklahoma case to consider the definition of "heinous, atrocious or cruel" in 21 Okla. Stat. sec. 701.12 was Eddings v. State, 616 P.2d 1159, 1167-68 (Okla. Crim., March 21, 1980), rev'd, 455 U.S. 104 (1982). While the reversal was on other grounds, this Court stated its understanding of of the meaning given to "heinous, atrocious or cruel" by the state court under state law:

We understand the Court of Criminal

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[4] In light of the State's view that "heinous, atrocious, or cruel" was given a constitutionally limited definition in 1987 (Response to Petition for Certiorari, Roger Dale Hayes v. Oklahoma, at 6, discussed supra note 2), it should be unnecessary to go any further. Nonetheless, amicus will here discuss the Oklahoma law available at the time of his (and Cartwright's) alleged crime.

> Appeals to hold that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel" under the Oklahoma statute.

455 U.S. at 109 n.4.

One cannot reasonably expect ordinary persons to have seen in the obscure state court language of Eddings v. State a different definition of "heinous, atrocious, or cruel" than that perceived by the members of this Court. Dicta in Eddings v. State, 616 P.2d at 1167-68, discusses tortuous or abusive killings. Given that torture or abuse was not involved in that case, this Court, 455 U.S. at 109 n.4, did not read such language as authoritative.

This Court's reading was accurate. A few months after the state court decision in Eddings, the Court of Criminal Appeals had explicitly repudiated a suggestion that that the phrase is aimed "only at the

conscienceless or pitiless crime, which is unnecessarily tor[tuous] to the victim." Irvin v. State, 617 P.2d 588, 598 (Okla. Crim. August 29, 1980). This opinion re-opened the definition of "heinous, atrocious, or cruel" in Oklahoma to all the evils of vagueness condemned by this Court in Godfrey v. Georgia, supra.

Thus at the time that amicus Roger Dale Hayes allegedly committed his crime, the notice that he had concerning what would be considered "heinous, atrocious or cruel" might reasonably be described as "less than zero."[5] He certainly had no notice of any constitutionally limited

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[5] Hays v.State, 617 P.2d 223, 232 (Okla. Crim., Aug. 28, 1980), and Chaney v. State, 612 P.2d 269, 282-83 & n.1 (Okla. Crim., May 15, 1980), cert. denied, 450 U.S. 1025 (1980), involved the "heinous, atrocious, or cruel" aggravating circumstance, but the Court in those cases set out no standard for defining it.

definition of what would be punishable by death--other than shooting a police officer, which he did not do.

The situation was hardly better for respondent Cartwright. Two more cases had been decided, in which the Court of Criminal Appeals had upheld convictions based upon jury instructions very similar to the ones condemned in Godfrey v. Georgia, supra. Jones v. State, 648 P.2d 1251, 1259 (Okla. Crim., July 26, 1982), cert. denied, 459 U.S. 1155 (1983); Burrows v. State, 640 P.2d 533, 542-43 (Okla. Crim., January 20, 1982), cert. denied, 460 U.S. 1011 (1983). The earlier of these cases contains reference to the more specific language set forth in the Court of Criminal Appeals version of Eddings, and both contain reference to specific bloody facts of the cases. Yet neither of them repudiates the holding of

Irvin, which effectively is that almost any murder can be considered "heinous, atrocious, or cruel."

Given the information available to amicus and respondent, there is no basis for concluding that either could have understood what murders would be considered "especially heinous, atrocious, or cruel." Where there is no fair notice of what will be punishable by death, a capital sentence violates due process of law.

Lack of notice is especially clear in the case of amicus Hayes. Even if it should be decided that respondent Cartwright had appropriate notice, this Court should make clear that every other case will depend upon the notice available to the public at the time the alleged crime was committed.

The arguments of petitioner Maynard,

representing the state of Oklahoma, and amici Attorneys General of other states miss the point that due process requires fair notice to the citizenry. They focus solely on whether the statute provides--or needs to provide--adequate direction to sentencers concerning which cases justify a death sentence.[6] But if, at the time of the crime alleged, a defendant could not

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[6] Petitioner Maynard also misses the point when arguing that this Court should not define "heinous, atrocious or cruel" as requiring torture. Brief of Petitioners at 37-55. Godfrey does not require such a state law definition. It merely provides that the definition must not be vague--it does not compel what the definition must be.

Thus Godfrey and other federal cases cannot be held to have provided respondent Cartwright or amicus Hayes with notice of the state law definition of "heinous, atrocious, or cruel." That is wholly a state law matter. Eddings, by its emphasis upon the fact that the victim was a police officer on duty, provides a much different definition of "heinous, atrocious or cruel" than that suggested by Godfrey or Proffitt v. Florida, 428 U.S. 242 (1976).

have had reasonable notice that it would be punishable by death under this provision, no amount of direction of the sentencer's discretion can make death a conscionable punishment.

CONCLUSION

No one should be required "at peril of life . . . to speculate as to the meaning of penal statutes." Bouie v. City of Columbia, supra. If fair notice is particularly important in First Amendment cases, id; Marks v. United States, supra; it is even more so in capital cases. The purpose of Godfrey, to introduce predictability into the execution of death sentences, is thwarted unless notice is given to the citizenry concerning what types of acts will merit that penalty. Confusion reigning in Oklahoma law at the time of the alleged crimes of amicus and respondent denied them notice that their

alleged crimes would be punished by death. In these circumstances, the state of Oklahoma should not kill Roger Dale Hayes and William Thomas Cartwright.

For this reason, as well as the reasons that respondent Cartwright stated in his Brief in Opposition to Petition for Writ of Certiorari and the reasons the undersigned expects Cartwright to assert in his principal brief, amicus Roger Dale Hayes respectfully requests that the judgment of the Tenth Circuit be affirmed in case no. 87-519. In his own case, No. 87-5676, amicus Hayes respectfully requests that certiorari be granted and the judgment of the Court of Criminal Appeals of Oklahoma be reversed, or the judgment of the Court of Criminal Appeals be vacated and remanded for further consideration in light of the judgment in case no. 87-519.

Respectfully submitted,

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March 11, 1988